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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 888

UNITED BISCUIT COMPANY OF AMERICA, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	4
Statement	4
Reasons for granting the writ	11
I	11
II	23
III	26
Conclusion	31
Appendix A:	
(1) Opinion of Court of Appeals	1a
(2) Final judgment of Court of Appeals	15a
Appendix B:	
(1) First initial decision	16a
(2) First Commission opinion	28a
(3) Second initial decision	36a
(4) Second Commission opinion	56a
(5) Final order of Commission	67a

CITATIONS

CASES:

American Oil Company, 60 F.T.C. 1796 (1962), rev'd on other grounds, 325 F. 2d 101 (1963), cert. denied, 377 U.S. 954 (1964) 22, 23, 26

Automatic Canteen v. F.T.C., 346 U.S. 61 (1953) 21

Fred Bronner Corp., Dkt. No. 7068, 57 F.T.C. 771 (1960) 14, 15

Page

Burlington Truck Lines v. United States, 371 U.S. 156 (1962) 15
Communications Workers v. N.L.R.B., 362 U.S. 479 (1960) 25
E. Edelmann & Co. v. F.T.C., 239 F. 2d 152 (1956), cert. denied, 355 U.S. 941 (1958) 19
F.T.C. v. Anheuser Busch, Inc., 363 U.S. 536 (1960) 12
F.T.C. v. Henry Broch & Co., 368 U.S. 360 (1962) 3, 23, 24, 25, 26
F.T.C. v. Morton Salt Co., 334 U.S. 37 (1948) 2, 8, 10, 13, 14, 15, 18, 19, 21, 22
F.T.C. v. Sun Oil Company, 371 U.S. 505 (1963) 23
Foremost Dairies, Inc. v. F.T.C., 348 F. 2d 674 (1965), cert. denied, 34 U.S. Law Week 3218 (Dec. 14, 1965) (No. 634) 19
Joseph A. Kaplan & Sons v. F.T.C., 347 F. 2d 785 (D.C. Cir. 1965) 26
Monroe Auto Equipment Co. v. F.T.C., 347 F. 2d 401 (1965), petition for cert. filed, 34 U.S. Law Week 3085 (U.S. Sept. 21, 1965) (No. 565) 26
Moog Industries, Inc. v. F.T.C., 238 F. 2d 43 (1956), affirmed, 355 U.S. 411 (1958) 19, 27
Mueller Co. v. F.T.C., 323 F. 2d 44 (1963), cert. denied, 377 U.S. 923 (1964) 26
N.L.R.B. v. Express Publishing Co., 312 U.S. 426 (1941) 25
National Biscuit Company, Dkt. No. 5013, 38 F.T.C. 213; modified, 50 F.T.C. 932 11
C. E. Niehoff & Co. v. F.T.C., 241 F. 2d 37 (1957), modified, 355 U.S. 411 (1958) 19
Security & Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947) 15
Sperry Rand Corp. v. F.T.C., 288 F. 2d 403 (D.C. Cir. 1960) 28
Standard Motor Products, Inc. v. F.T.C., 265 F. 2d 674 (1959), cert. denied, 361 U.S. 826 (1959) 19
Sunshine Biscuits, Inc., Dkt. No. 6191, 52 F.T.C. 110 .. 11
Tampa Electric Co. v. Nashville Coal Company, 365 U.S. 320 (1961) 17
Tri-Valley Packing Ass'n, 60 F.T.C. 1134 (1962), rev'd on other grounds, 329 F. 2d 694 (1964) 26
United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 17

Page

Universal-Rundle Corp. v. F.T.C., — F. 2d — (1965) 26, 29, 30
Whitaker Cable Corp. v. F.T.C., 239 F. 2d 253 (1956), cert. denied, 353 U.S. 938 (1957) 19

STATUTES:

Clayton Act, Section 2(a), as amended (49 Stat. 1527; 15 U.S.C. § 13(a)) 2, 3, 4, 12, 15, 17, 26, 28, 29
1959 "finality" amendments (38 Stat. 734, 15 U.S.C. § 21, as amended July 23, 1959, Pub. L. 86-107, 73 Stat. 243) 24, 29

MISCELLANEOUS:

Austern, *Five Thousand Dollars A Day,* 21 A.B.A. Antitrust Section 285, 308 (1962) 26
Barnes, *The Robinson-Patman Challenge to Buyers' Competition,* 9 Antitrust Bulletin 415 (1964) 22
Barton, *Competitive Injury Under the Robinson-Patman Act,* 19 The Business Lawyer 649 (1964) 22
Edwards, *Tests of Probable Effect Under the Clayton Act,* 9 Antitrust Bulletin 369 (1964) 22
Edwards, The Price Discrimination Law, Ch. 16 (1959) 22
Handler, *Recent Antitrust Developments—1964,* 63 Michigan L. Rev. 59, 78-85 (1964) 22
Rowe, Price Discrimination Under the Robinson-Patman Act, Ch. 8 (1962), Supp. (1964) 22, 26
105 Cong. Rec. 12734-5 25
H. R. Rep. No. 580, 86th Cong. 1st Sess. 25

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

United Biscuit Company of America ("United") petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case on August 9, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra,* pp. 1a-14a) is officially reported at 350 F. 2d 615. The opinions and order of the Federal Trade Commission (R. 42, 110, 112)[1] and the initial decisions of

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[1] "R" refers to the printed record in the Court of Appeals.

the hearing examiner (R. 29, 52) are not yet officially reported. They are set out in Appendix B, *infra*, pp. 16a-69a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1965 (App. A, *infra*, p. 15a). On October 25, 1965, Mr. Justice Clark entered an order extending the time for filing a petition for a writ of certiorari to and including December 13, 1965. On December 7, Mr. Justice Clark entered an order granting a further extension to and including January 7, 1966. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In a proceeding under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, the Commission found that volume discounts given by United in the sale of crackers and cookies to its retail grocery customers might substantially lessen or injure competition among those customers. The Commission's determination was based on the proposition that the requisite injury to competition may be automatically inferred whenever a difference in price is charged to competing customers in a competitive industry. On the basis of this determination, the Commission issued an order in the sweeping language of the statute, prohibiting United from granting any form of price differences to competing customers.

On review, the Court of Appeals rejected this automatic inference test of the Commission but affirmed the Commission's order on the basis of the court's own new interpretation of *F.T.C.* v. *Morton Salt Co.*,

334 U.S. 37 (1948), as holding that the effect on competition of the discount schedule on a single product in a grocery store is to be judged by considering what would be the effect if the same discount were extended to all other products handled by the grocery store, since "an incipient harm . . . could grow into reality if extended to all the items handled by the grocer."

The following questions are presented:

1. Whether the Court of Appeals erred in holding that although price differentials on a seller's product are by themselves relatively insignificant, the competitive injury required under Section 2(a) may be established by considering what would be the effect on competition if the same discounts were extended to cover all other products handled by the seller's retail grocery customers, where there was neither evidence nor findings by the Commission on that point, and where the Commission itself did not base its order on that theory.

2. Whether, under this Court's decision in *F.T.C.* v. *Henry Broch & Co.*, 368 U.S. 360 (1962), the Court of Appeals erred in failing to require that the cease and desist order issued by the Commission be limited to the type of pricing practice adjudicated in this proceeding.

3. Whether the Court of Appeals erred in failing to set aside as an abuse of discretion the Commission's refusal to stay the cease and desist order in this case until United's two larger competitors, who are granting volume discounts similar to those granted by United, have been brought into compliance with outstanding cease and desist orders against them prohibiting their use of such volume discounts.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, as amended (49 Stat. 1527; 15 U.S.C. § 13(a)), in pertinent part provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . .

STATEMENT

This petition seeks review of a judgment of the Court of Appeals for the Seventh Circuit affirming an order of the Federal Trade Commission which in effect directs petitioner, United, to cease and desist from violating Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

The essential facts are undisputed. United is engaged in the manufacture and sale of cookies and crackers, referred to collectively as "biscuit products." (R. 56) The Commission's complaint charged United with a violation of Section 2(a) of the Act by

discriminating in price in sales to its retail grocery customers, thereby causing an actual or probable substantial injury to competition among these customers. (R. 5) The price discrimination charged consisted of the use of graduated volume discounts, uniformly applied, which ranged from 0 per cent through several brackets to a maximum of 6 per cent. (R. 7)[2] The discount percentage was based upon the individual customer's monthly dollar purchases from United, so that if a customer owned more than one outlet, the appropriate discount bracket was determined on the basis of the combined purchases of all of that customer's outlets. (R. 8)

During the year 1959, the period involved in the proceeding, United used two different volume discount schedules. (R. 7) The first schedule, in effect through June 30, 1959, was as follows:

Monthly Purchases	Discounts
$ 00.00 to $ 24.99	0%
25.00 to 39.99	2%
40.00 to 69.99	3%
70.00 to 99.99	4%
100.00 to 124.99	5%
125.00 and over	6%

[2] The proceeding before the Commission related specifically to discount schedules employed during the year 1959 by one of United's then 8 geographical divisions—then known as the Sawyer Division—which covered a seven-state region in the middle west. (R. 56-58)

For the balance of 1959, the following revised schedule was in effect:

Monthly Purchases	Discounts
$ 00.00 to $ 24.99	0%
25.00 to 44.99	1½%
45.00 to 59.99	2%
60.00 to 74.99	2½%
75.00 to 89.99	3%
90.00 to 109.99	3½%
110.00 to 129.99	4%
130.00 to 149.99	5%
150.00 and over	6%

The Commission's case with respect to the operation and anticompetitive effect of United's discount practices was based on evidence of the purchases made and discounts received during two separate three-month periods in 1959 by thirteen independent stores and six chain store outlets located in three cities. (App. A, *infra*, pp. 2a-3a) The Commission called owners of all but one of the thirteen independent stores as witnesses before the hearing examiner. The purchases and discounts of the stores were not in dispute.

The evidence established that most of the major chains received the maximum 6 per cent discount, but that some of the independents also received the 6 per cent. For example, in Gary, Indiana, as shown in the tabulation appearing in the opinion of the Court of Appeals (App. A, *infra*, pp. 3a-4a, n. 2), the retail outlets of the two chain stores each received 6 per cent, while two of the four independents also received 6 per cent during various months.[3]

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[3] Overall figures for the entire 7 state operation of the Sawyer Division show a similar pattern. Thus, for January, 1959, of 21,773 retail grocery customers, 3,718 received a 2% discount,

More importantly, the undisputed evidence also showed that if those independents who received less than the maximum 6 per cent discount had in fact received it, the additional amounts received by each would have been so small that, taking Gary again as an example, the amount would be from 70 cents to $2.65 a month. (App. A, *infra*, pp. 3a-4a, n 2)

At the close of the Commission's case, the hearing examiner, on United's motion, filed an initial decision dismissing the complaint for failure of the Commission to prove either actual or probable injury to competition. The examiner, upon his review of all the evidence, concluded:

> There are many complex factors which enter into the ability of the independent grocery store operator to compete successfully with the corporate chains and with the members of the buying groups. A few dollars per annum difference in the cost of respondent's biscuit products is a relatively remote and unimportant factor. Moreover, the hearing examiner received the distinct impression from the testimony of the store owners that, except for one or two, their businesses are growing and their annual sales are increasing. If, therefore, these independent owners were produced as examples of businessmen who had been competitively injured by respondent's discount schedules, they failed to prove such injury or the possibility thereof. (R. 34)

In reaching his conclusion, the examiner relied in part on the testimony of the independent store witnesses (called as witnesses by the Commission) who expressly

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2,287 3%, 704 4%, 310 5%, and 1,038 6%. The latter group included 42 major chains, but it also included 856 independents. 13,716 customers, who purchased less than $25.00 in that month, received no discounts. (R. 114, 389-92)

answered as to the effect of United's discounts on customer-level competition. He noted that, with only one exception, these witnesses stated that their businesses would not be affected in any substantial degree by United's discounts. (R. 35)

On appeal the Commission reversed the hearing examiner on the ground that the examiner had "erred in failing to apply the proper test to make this determination [of injury to competition]" (R. 47), and, in remanding the proceeding to the examiner, stated that the evidence, if unrebutted, was sufficient to show injury to competition. (R. 50) Ostensibly basing its decision on this Court's opinion in *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37 (1948), the Commission held that the requisite competitive injury at the customer level "may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent . . .". (R. 49) After briefly reviewing the facts, the Commission concluded that each of the discount differentials (ranging from the maximum of 6 per cent to as low as a difference of ½% between brackets) had the requisite anticompetitive effect.

No further evidence was introduced on remand. (R. 51) Nevertheless, the examiner, although confronted with the same record, rewrote his original decision, dropping various findings and adding others so as to conform with the Commission's opinion, and accordingly produced a decision stating that the requisite injury to competition had been established and that Section 2(a) had been violated. (R. 52)

On review, the Commission (one commissioner concurring in the result and another not participating)

adopted the examiner's second decision, with slight modifications not pertinent here. (R. 112) The Commission stated that the examiner's findings as to competitive injury were in accord with its views as set forth in its first opinion. (R. 118) The Commission made no findings that resale prices on biscuit products differed as between those customers of United which received the maximum discount and those which did not, that price was important in the resale of those products, that the retail sale of those products was competitive, that the discounts paid by United were substantial in dollar amounts, or that the discounts affected either resale prices or profits. The Commission also made no reference whatever to the testimony of the independent store owners expressly negating any adverse competitive effect from United's discounts. The Commission made clear that in its view, moreover, the violation proved was in the use of a graduated volume discount in and of itself, whether the combining of purchases by store outlets was present or not. (R. 118)

The Commission, rejecting United's objections, issued an order in the broad language of the statute directing United to "forthwith cease and desist from discriminating, directly or indirectly, in the price of . . . [food] products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale of such products." (R. 111)

On appeal, the Court of Appeals for the Seventh Circuit affirmed the Commission's order. (App. A, *infra*, pp. 1a-15a) On the question of the legal standard to be applied in determining the likelihood of sub-

stantial injury to competition, however, the court rejected the automatic inference test applied by the Commission, and supplied a new test of its own. The court, in rejecting as irrelevant the testimony of the independents that United's discounts were not significant, held:

> [E]ven though price discriminations covering a single item in a grocery store may appear relatively insignificant when considered alone, they may assume the stature of substantiality when considered in the context of the store's total operation and as an incipient harm which could grow into reality if extended to all of the items handled by the grocer. (App. A, *infra*, p. 11a)

This criterion of substantial probable effect on competition, which was adopted by the court as the proper one for this case, was said to be required by *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

The court also rejected United's contentions that the order was unwarrantedly broad and vague and constituted no more than a restatement of the statute.

In addition to affirming the Commission's order to cease and desist, the court also upheld the Commission's denial of a motion by United to stay enforcement of that order. In that motion United moved that the Commission stay enforcement of the order against United until the Commission had acted to determine whether United's two major competitors, National Biscuit Company and Sunshine Biscuits, Inc., were in compliance with outstanding cease and desist orders against them so as to subject each company to the

same treatment at the same time.[4] (R. 123) United's motion alleged that both companies were still granting graduated volume discounts on the sale of their biscuit products, notwithstanding that the cease and desist orders against both companies forbade such practices. At an earlier point in the proceeding, the Commission had disclosed that no reports of compliance by either National or Sunshine had been "received and filed as showing compliance," and that reports therefore had "not been formally acted upon by the Commission and are still pending before it for consideration." (R. 96) United pointed out that if its two larger competitors were permitted to use graduated volume discounts while it was not, United would be placed at a grave competitive disadvantage. This motion was denied by the Commission. (R. 140-41) Far from really considering the serious competitive disadvantage which United would suffer by being required to give up volume discounts while its larger competitors continued to use them, the Commission summarily held that any "compliance question" concerning either National or Sunshine was a "matter to be separately considered on its own merits." (*Ibid.*)

REASONS FOR GRANTING THE WRIT

I.

This case presents a substantial and important question regarding the proper legal standards to be applied in administering the price discrimination provi-

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[4] The National Biscuit Company order was issued in 1944, *National Biscuit Company*, Docket No. 5013, 38 F.T.C. 213, and modified by the Commission in 1954, 50 F.T.C. 982. The order against Sunshine Biscuits, Inc. was issued in 1955, *Sunshine Biscuits, Inc.*, Docket No. 6191, 52 F.T.C. 110.

sions of the Robinson-Patman Act, namely whether competitive injury may be established upon a mere presumption of economic effect respecting wholly unrelated products instead of by factual findings based upon a reasoned analysis of record evidence of the actual market realities pertinent to the specific case and relating to the products as to which discrimination is charged. The decision of the court below in this case sets up a new legal test which would eliminate that price flexibility so essential for the competitive marketing not only of food products to retail grocers, but also, since the test is of general applicability, the competitive marketing of many other products in other sectors of the economy.

Before considering the new legal test employed by the court below, it is important to note that the basic standards for judging the legality of a price discrimination are set forth in Section 2(a) of the Robinson-Patman Act, which makes it unlawful for "any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . ." By its terms, two basic requirements must be satisfied to make out a violation: (1) a price discrimination by the respondent and (2) substantial actual or probable injurious effects on competition resulting from that discrimination.

In this case there is no question about the existence of the first prerequisite—a discrimination in price. This Court has held that a mere price difference is sufficient to show a discrimination in price within the meaning of the Act. See *F.T.C.* v. *Anheuser-*

Busch, Inc., 363 U.S. 536, 549 (1960). Here United's volume discounts did clearly produce differences in price; the key question is whether these differences produced the requisite injurious effects on competition.

The Court of Appeals recognized that United's volume discounts in themselves had not been shown to have a probable "substantial" adverse effect on competition. Unable to espouse the Commission's tacit assumption as to their effect, the court proceeded upon a new assumption of its own in order to supply the requisite injury to competition. It interpreted this Court's opinion in *F.T.C.* v. *Morton Salt Company*, 334 U.S. 37 (1948), as holding that a discrimination in price by one supplier on its product line (in this case in the biscuit products industry, with its long history of graduated volume discounts), which is in itself "relatively insignificant," may assume the stature of "substantiality" if projected to cover all the other products purchased by the customer from other suppliers. Under this interpretation the difference in price is condemned not because of any probable effects that *it* may have on competition, but solely because a similar discrimination in price, if in some conceivable way it were extended to all other products purchased by the customer from all other suppliers, might have a substantial adverse effect on competition. This theoretical test of injury, if accepted, would eliminate all volume discounts and every other form of price difference in the grocery trade and in all other businesses, retail, wholesale or otherwise, which handle more than a single product. For any discount, no matter how small, if projected to cover the thousands of grocery items handled by the average retail store, would assume the proportions of "substantiality."

The theory of the court below is based upon a misreading of this Court's opinion in *Morton Salt*. In that case this Court held that the various items handled by a grocery store must be treated separately, not collectively; hence if a grocery store customer were injured competitively with respect to one item, it would be no defense to show that his trade in this item constituted such a small portion of his total grocery store business that no injury to the latter could be found or assumed. The "interpretation" of *Morton Salt* offered by the Court of Appeals conflicts with this view, for it requires a consideration, which is necessarily hypothetical and speculative, of the entire stock of the grocer rather than a focusing upon the specific product purchased from the respondent.

In this connection it is important to note that the court's test is based only on speculative assumption. The record is devoid of evidence as to the existence, let alone the magnitude, of discounts or other price discriminations with respect to the multitudinous other items carried in a typical grocery store, and the Commission itself made no findings in this regard.

The Commission, moreover, has itself rejected the very theory advanced by the Court of Appeals. In *Fred Bronner Corp.*, Dkt. 7068, 57 F.T.C. 771 (1960), staff counsel for the Commission argued that a discount schedule was "illegal for the reason that if discounts at the same rate were granted to respondents' favored customers by all of their suppliers, the effect on competition would be substantial." In rejecting this interpretation of *Morton Salt*, the Commission stated: "The contention of counsel supporting the complaint that we project the discount to other merchandise

purchased by the favored customers is clearly beyond the holding in the *Morton Salt* case and must be rejected." (*Id.* at p. 784).

Quite apart from the Commission's express repudiation in *Bronner* of the "projection" theory, the Court of Appeals could not properly sustain the Commission's decision here on that theory when the Commission itself reached its decision on another ground. As this Court has stated:

> [A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Security & Exchange Comm'n.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

See also *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-9 (1962).

As its resort to the across-the-board product projection theory indicates, the reviewing court clearly recognized that the Commission's order could not be sustained on the inadequate theory of the Commission that Section 2(a) forbids price differences merely because they occur within a keenly competitive, low-profit industry. In its opinion the Commission merely recited the historic facts about the retail grocery business in general—that it is highly competitive, that net profits are low, that prices are important—but it did not make any findings in any way relating United's volume

discounts to either the trade in biscuit products or to the grocery business as a whole. The Commission did not find that United's discounts were in fact substantial in amount; or that these discounts would have any adverse effect on the sale of biscuit products (*e.g.*, that the discounts were capable of producing or had produced differences in resale prices, or that the degree of competitiveness in the sale of biscuit products was such that price differences would be important in attracting customers). The Commission did not find that United's resulting higher prices to some customers, if not passed on in higher retail prices, would tend to cut substantially into the margin made on the resale of biscuit products, or that the sums received by customers receiving the maximum discount would tend to enhance significantly their competitive position. In short, the Commission's findings completely fail to disclose any meaningful relationship between United's discounts and a probable substantial injury to competition.

The Commission's position thus reduces to the thesis that in a price discrimination case alleging injury at the customer level, proof of illegality may consist *solely* of a showing that a price difference was charged competing customers in a competitive industry. The Commission, to be sure, describes its test more narrowly, stating that the price difference must be "substantial" and that "substantiality" turns on the "facts" in each case. But these qualifications are essentially meaningless, since the Commission, as pointed out above, has utterly failed to make findings as to any of the facts by which "substantiality" can be meaningfully measured.

A conclusion of illegality must, as in any Clayton Act case,[5] be based on the long-term, probable, foreseeable effects on competition of the seller's pricing. What must be decided is whether the discriminatory pricing is likely to cause changes in the market adverse to competition. Does it present a substantial danger to competition by favoring one class of customers over another class of customers? Will it, by giving some customers lower prices than others, tend to lessen competition substantially or create a monopoly in any line of commerce?

These and other related questions relevant to the inquiry into competitive injury can only be answered by examining the impact of any given price discrimination on the customers who are buying from the seller. Although the Commission did not question the actual appraisal of the competitive facts made by the examiner, in which he concluded that there was no competitive injury, it held as a matter of law that the wrong standard was used and imposed its own legal formula that an "inference" of competitive injury must be drawn from the mere fact that a seller does not maintain uniform prices to all customers. In doing so the Commission rendered the evidentiary hearing, including the testimony of the retail store witnesses called by the Commission itself, a meaningless exercise.

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[5] The same statutory test of injury to competition for price discrimination under § 2 is used for determining the legality of exclusive dealing arrangements under § 3 (*e.g.*, *Tampa Electric Co.* v. *Nashville Coal Company*, 365 U.S. 320 (1961)) and for determining the legality of acquisitions under § 7 (*e.g.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362 (1963)).

This automatic inference test is contrary to the purposes and underlying rationale of the price discrimination law, and denies the respondent the fact-finding hearing required by Section 11 of the statute. This test, moreover, is not dictated by this Court's opinion in *Morton Salt,* which was cited as the principal authority by the Commission. In that case this Court did not hold that the statutory requirement of injury to competition may be satisfied by a mere showing of any substantial price difference charged to competing customers; to say that it did is to ignore the factual context in which this Court decided that case and which serves to limit the opinion.

In *Morton Salt* this Court held that a "substantial" price differential sufficient to "influence resale prices" on a low-margin, price-competitive item permitted an inference of probable injury to competition. (334 U.S. at 47-48) Moreover, the facts of that case demonstrated that the quantity discount schedule used by Morton Salt had the effect of granting a substantially lower price to only five huge buyers purchasing more than 50,000 cases per year, while all other buyers had to purchase at substantially higher prices. In other words, the quantity discount schedule was so arranged that the disfavored customers could not as a practical matter qualify for the maximum discount. Under these circumstances, where substantially lower prices were given to one class of customers sufficient to influence resale prices, a finding of injury to competition was justified.

Similarly, in the so-called *Automotive Parts* cases,[6] which the Commission also cited as supporting precedent for the automatic inference test (R. 48-49), the discount schedules contained a spread so great that the higher discounts were available only to a few select large-buying customers. Not only were there high differentials in the volume discount schedules (ranging to 20 per cent in one case and 30 per cent in another case), but they were computed on the basis of annual sales. Price differentials of this type, in the industry context of keen competition in auto parts and tight profit margins, were held to warrant a finding of adverse competitive effects.

The recent case of *Foremost Dairies, Inc.* v. *F.T.C.*, 348 F. 2d 674 (5th Cir. 1965), *cert. denied*, 34 U.S. Law Week 3218, (Dec. 14, 1965) (No. 634) involved a situation comparable to that in *Morton Salt*. There the discounts were given on a product—milk—which was found to be a low-margin item; there were also findings that another customer not receiving the discount was compelled to reduce substantially his prices on milk to meet competition, and that such a price reduction would attract customers.

In this case, on the contrary, the product sold carries a relatively high markup—from 15 per cent to 25 per cent. (R. 177, 189, 198, 242, 259, 298) Furthermore, United's discounts did not have the effect of

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[6] *Moog Industries, Inc.* v. *F.T.C.*, 238 F. 2d 43 (8th Cir. 1956), *affirmed*, 355 U.S. 411 (1958); *C. E. Niehoff & Co.* v. *F.T.C.*, 241 F. 2d 87 (7th Cir. 1957), *modified*, 355 U.S. 411 (1958); *E. Edelmann & Co.* v. *F.T.C.*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); *Whitaker Cable Corp.* v. *F.T.C.*, 239 F. 2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); *Standard Motor Products, Inc.* v. *F.T.C.*, 265 F. 2d 674 (2d Cir. 1959), *cert. denied*, 361 U.S. 826 (1959).

creating separate classes of customers, since, as the undisputed evidence shows, the volume discounts were closely graduated and computed on a monthly basis so that they were freely and practically available to all customers, regardless of the size of the retail grocery establishments. For example, United's second schedule, *supra,* p. 6, starts at a low level, with a 1½ per cent discount for purchases of $25, and then moves upwards with incremental sales of varying amounts less than $20, by ½ or 1 per cent, to the maximum of 6 per cent for purchases of $150 or more. This closely graduated discount schedule permits individual customers to move easily from one discount level to another; and as seen in the tabulation set out in the opinion of the court below (App. A, *infra,* pp. 3a-4a, n. 2), the maximum of 6 per cent is within the reach of both independent and chain stores.

Obviously, United's discount schedule was not designed to exclude, nor did it have the effect of excluding, the independent grocer from the maximum discount. Indeed, until the Commission's second opinion, United was of the belief that the Commission's objection to its discount schedules was based solely on the store-combining feature by which chains were able to secure the maximum discount by combining the purchases of their many outlets. However, the Commission and the Court of Appeals have both ruled that the discounts were unlawful without the store-combining feature. Even with that feature, there has been a failure here to establish substantial competitive injury; without it there is not even a theoretical basis for arguing that the multi-market or chain stores were favored over the independent stores. Indeed, as the opinion of the court below shows, (App. A, *infra,* pp. 3a-4a, n. 2) without the store combining

feature, the independent retail stores in Gary, Indiana qualified for higher discounts than the chain outlets. A similar situation was revealed for the other two cities.

These undisputed record facts showing the actual competitive situation surrounding the use of United's discount schedules demonstrate the essential fallacy of the approaches taken by the Court of Appeals and the Commission. In both cases speculative theories of injury were substituted for an actual reasoned analysis of what happened in the marketplace. Perhaps there is an inevitable tendency for those charged with the task of prosecution to seek simplified enforcement tests, but this is a tendency, as this Court has stated, that must be resisted. In *Automatic Canteen* v. *F.T.C.*, 346 U.S. 61, 63 (1953), this Court warned that "simplified enforcement" of the price discrimination statute "might readily extend beyond the prohibitions of the Act and in doing so, help give rise to price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."

This is exactly what has happened with the Commission's doctrinaire application of the *Morton Salt* decision. That decision has been so broadened and made rigid by Commission interpretations that inferences rather than evidentiary proof are now relied upon to forge the causal link between challenged price differences and claimed competitive harm. Furthermore, the product-projection test espoused by the court below, if adopted and applied, would require uniform pricing throughout a large part of our national economy. Its immediate impact would be in the grocery trade, but it would equally apply to all wholesale and retail establishments handling multiple

products. This would bring about a new rigidity in pricing. And since price uniformity is the very antithesis of competition, the end result would be a lessening of competition in our economy.

It is important that this Court resolve this conflict in standards which has become a center of controversy in recent years,[7] even to the point of dividing the members of the Federal Trade Commission. Recently, Commissioner Elman, in a strong dissent in another secondary-line price discrimination case (*American Oil Company*, 60 F.T.C. 1786 (1962)), pointed out the deficiencies in the Commission's mechanical extension of the *Morton Salt* decision. He stated:

> In other words, the legal formula which the Commission derives from *Morton Salt* is that "competition between buyers" *plus* "substantial difference in price" *equals* "significant competitive advantage" to the favored buyers, which in turn *equals* "probable injury to competition".
>
> The attractiveness of this formula cannot be denied. Its application dispenses with the need for inquiry into the probable effects on competition, either generally or with disfavored customers, of a price discrimination, so long as the difference in price is substantial in amount. But the Supreme Court surely did not intend in *Morton Salt* to relieve the Commission of the duty to make an informed expert judgment, based upon

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[7] See especially Edwards, The Price Discrimination Law, Ch. 16 (1959); Rowe, Price Discrimination Under the Robinson-Patman Act, Ch. 8 (1962), Supp. (1964); Edwards, *Tests of Probable Effect Under the Clayton Act*, 9 Antitrust Bulletin 369 (1964); Barnes, *The Robinson-Patman Challenge to Buyers' Competition*, 9 Antitrust Bulletin 415 (1964); Barton, *Competitive Injury Under the Robinson-Patman Act*, 19 The Business Lawyer 649 (1964); and Handler, *Recent Antitrust Developments—1964*, 63 Michigan L. Rev. 59, 78-85 (1964).

> the relevant economic facts, as to the likelihood of injury to competition resulting from differing kinds of price discrimination. The Court did not lay down a hornbook black-letter formula, to be applied automatically and indiscriminately to every type of price discrimination without regard to differences in economic effect. (*Id.* at 1815)

More recently, this Court itself warned against the inflexible application of mechanical word formulas. In *F.T.C.* v. *Sun Oil Company,* 371 U.S. 505 (1963), this Court cited with approval Commissioner Elman's dissent in *American Oil,* adding that: "In appraising the effects of any price cut or the corresponding responses to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made the substitute for adequate probative analysis." (*Id.* at 527)

II.

The order here flatly forbids all price discriminations to competing customers without limitation as to size, type, or duration. The Commission, by issuing an order of such breadth and generality, has exhibited again its insistence on striking down price differentials without regard to their economic effect, and, like the court in approving it, has disregarded the directive of this Court in *F.T.C.* v. *Henry Broch & Co.,* 368 U.S. 360 (1962), and the Congressional intent embodied in the amendatory legislation of 1959, that orders issued under the Act must be clear and precise rather than mere restatements or paraphrases of the statutory language.

This proceeding involved only the use of graduated volume discounts on sales of biscuit products to retail

grocery customers. The order issued, on the other hand, applies to any and all forms of price differentials on sales of all food products to any type of customer purchasing for resale, regardless of the impact of the differentials on competition.

The Court of Appeals apparently misapprehended the nature of United's contention with respect to the breadth of the order. It stated, "United also challenges the Commission's order as being too broad in prohibiting all price discriminations resulting from the use of volume discount schedules and not limiting it to those situations in which the purchases of multiple chain outlets in a particular area were combined for the purpose of discounts." (App. A, *infra.*, p. 13a) The court, having determined that volume discounts as such had been found illegal, therefore concluded that no question as to the breadth of the order was presented. As pointed out above, however, the order here covers all forms of price differentials, not just volume discounts.

In the *Broch* case this Court recognized that the change in the procedure for review and enforcement of Commission orders effected by the 1959 "finality" amendments (38 Stat. 734, 15 U.S.C. § 21, as amended July 23, 1959, Pub. L. 86-107, 73 Stat. 243) required that orders be subjected to more rigorous standards than had been applied under the Act prior to its amendment.

Even prior to *Broch*, this Court had made clear that administrative orders, to the extent that they proscribed practices other than those actually found to have violated the Act, must define "with reasonable specificity" the additional acts proscribed, and must rest on evidence and findings that those acts were "per-

suasively . . . related to the proven unlawful conduct," *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 433 (1941). See also *Communications Workers* v. *N.L.R.B.*, 362 U.S. 479, 480-81 (1960). As pointed out in *Broch*, however, since no penalties could attach under the old Act until after an enforcement proceeding in the Court of Appeals, it was unnecessary and even "premature" to restrict the scope of an overbroad order at the initial stage of judicial review. Such action was rather to be taken at the point when enforcement was sought, for at that time the Court of Appeals could construe and tailor the order "in the setting of a specific asserted violation," and then determine whether the challenged practice was "identical with or like or related to the violations" which had been found to have been committed. (368 U.S. at 366)

Under the amendatory legislation, however, a Commission order, such as in the instant case, will become final either in the absence of review by the respondent or upon affirmance of the order. Thereafter, heavy penalties ($5,000 per day for each violation) may be imposed upon the respondent for violation of the order without further opportunity for construction or "tailoring" by the Court of Appeals. It thus becomes vital that orders, when issued, be "at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." (368 U.S. at 368)

The legislative history of the 1959 amendments also discloses a Congressional belief that the Commission's orders had hitherto been unduly broad and general, and an intention to alter that practice. (See 105 Cong. Rec. 12734-5; H.R. Rep. No. 580, 86th Cong. 1st Sess.;

cf. F.T.C. v. *Henry Broch & Co.*, 368 U.S. 360, 365, n. 6 (1962)).

Nevertheless, despite this Court's clear mandate in *Broch*, the Commission still continues to issue Section 2(a) orders in the language of the statute.[8] This form of order prohibiting all price differences to competing customers is particularly unwarranted here where the only form of price discrimination was United's use of volume discounts, which were held to be unlawful on the basis of legal tests unrelated to any factual evidence of injury to competition.

III.

The refusal of the Commission to grant a temporary stay of enforcement of its order against United was, under the special circumstances of this case, a patent abuse of discretion which should have been corrected by the Court of Appeals. Indeed, the court's decision in this respect is in direct conflict with a decision rendered less than two months later by another panel of the same court in *Universal-Rundle Corp.* v. *F.T.C.*, — F.2d — (7th Cir. 1965), reported in 1965 Trade

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[8] See, *e.g.*, *American Oil Co.*, 60 F.T.C. 1786, 1826 (1962), *rev'd on other grounds*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Mueller Co.* v. *F.T.C.*, 323 F.2d 44, 47 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *Tri-Valley Packing Ass'n.*, 60 F.T.C. 1134, 1182 (1962), *rev'd on other grounds*, 329 F.2d 694 (9th Cir. 1964); *Joseph A. Kaplan & Sons* v. *F.T.C.*, 347 F.2d 785, 788 (D.C. Cir. 1965); *Monroe Auto Equipment Co.* v. *F.T.C.*, 347 F.2d 401 (7th Cir. 1965), *petition for cert. filed*, 34 U.S. Law Week 3085 (U.S. Sept. 21, 1965) (No. 565). *Cf.* Austern, *Five Thousand Dollars A Day*, 21 A.B.A. Antitrust Section 285, 308 (1962); Rowe, *Price Discrimination Under The Robinson-Patman Act*, p. 153 (1964 Supp.).

Cases ¶71,578. This conflict in decisions also requires corrective action by this Court.

In *Moog Industries, Inc.* v. *F.T.C.*, 355 U.S. 411 (1958), this Court recognized that while the determination whether to postpone the effective date of a cease and desist order so as to achieve uniform application of the law is normally within the discretion of the Commission, an abuse of that discretion can be set aside by the reviewing Court of Appeals. (*Id.* at 414) Unlike the situation in *Moog,* allowance of the stay requested here would not require the Commission to institute and complete possibly lengthy and costly complaint proceedings against a large number of other firms in the industry. The stay requested by United related to only *two* other companies, with respect to each of which the Commission had, over ten years ago, instituted proceedings and obtained consent cease and desist orders.

The complaint against National Biscuit Company issued over 20 years ago, and the complaint against Sunshine Biscuits, Inc., 11 years ago. (R. 125-27) In each case the complaints were directed against the use of volume discounts substantially similar to those of United, and the orders against both National and Sunshine prohibit such discounts. Yet, despite some changes in the schedules employed over the years, both National and Sunshine have continued to grant essentially the same discounts as before. (R. 129-31) This continued practice does not necessarily reflect a determination by the Commission that those volume discounts are legal, for the Commission has itself stated in the instant proceedings that no report has been received and filed by either National or Sunshine as

showing compliance by either company, notwithstanding that the orders against each of these companies required that reports of compliance be filed within sixty (60) days thereafter. (R. 96)

Thus, although it had determined that National and Sunshine had violated Section 2(a), the Commission, deliberately or by inaction, has simply failed to follow through and make that determination effective. At the same time, because of the limited scope which the Commission gives to the statutory defense of meeting competition, the very fact of the Commission's issuance of orders against National and Sunshine prevents United from employing that defense because its competitors' discounts are not lawful.

Because the National and Sunshine orders issued before the enactment of the Finality Act of 1959, those orders are without effect unless the Commission seeks affirmative enforcement, which it has not done. Since the Commission has failed to implement these orders, National and Sunshine, which rank, respectively, first and second in the biscuit products industry (R. 132), are free to continue using their discount schedules whereas United, with an order governed by the immediate and severe penalties imposed by the 1959 Finality Act, would be compelled to give up its discounts as soon as the order becomes final. See *Sperry Rand Corp.* v. *F.T.C.*, 288 F.2d 403, 404 (D.C. Cir. 1960). The effect of this disparity in treatment is not only to subject United to grave and irreparable competitive injury, but also to severely injure competition in biscuit products in general by further enhancing the position of National, already the dominant company in the industry.

The court's opinion in this case was handed down on August 9, 1965, by a panel composed of Chief Judge Hastings and Judges Duffy and Swygert. On October 22, 1965, in the case of *Universal-Rundle Corporation* v. *F.T.C., supra,* another panel of the same court, composed of Judges Duffy, Schnackenberg, and Knoch, handed down a decision in which, without discussion or even mention of the decision in this case, the court set aside the Commission's refusal to stay a cease and desist order under closely similar circumstances.*

In *Universal-Rundle,* as in the present case, the Commission had entered a cease and desist order based on a finding that discounts granted by Rundle to its customers constituted secondary-line price discriminations violative of Section 2(a) of the Act. Rundle then filed a petition with the Commission asking that the Commission stay its order pending initiation of an investigation into what Rundle alleged were similar discount practices by other members of the industry, and institution of whatever proceedings the Commission might deem appropriate to correct those practices. Rundle alleged that its competitors were in fact granting larger discounts than those which it was granting, and, moreover, that Rundle's share of the industry was only 5.75 percent as compared with 32 percent held by its largest competitor.

The Court of Appeals in *Universal-Rundle* held that in view of the alleged general prevalence in the industry of the practice involved, the Commission's selection

* A petition filed by the Commission asking for a rehearing *en banc* was denied by the full court on December 17, 1965, with one judge dissenting.

of Rundle as a target was "inequitable," "unjustified," and a "patent abuse of discretion." Since the industry consisted only of a few members, the court stated, no reason appeared why the Commission could not "seek a final decree covering all of them." (1965 Trade Cases at p. 81, 612)

Universal-Rundle and the present case thus have in common that a smaller company has been injuriously singled out to the advantage of larger competitors engaged in substantially similar practices, and that the result of such singling out is to benefit "the giants in the field" rather than the public. Moreover, in *Universal-Rundle* the consequence of the court's action is to require the Commission to initiate proceedings against an entire industry. In this case the Commission is being asked only to perform its ministerial duty of completing proceedings against two companies, the adjudicative phase of which was ended over ten years ago. The conflict of the decisions of the Seventh Circuit in this case and in *Universal-Rundle* presents a serious question in an important area of administration of the Act and requires resolution by this Court. The Commission itself in its petition for rehearing in *Universal-Rundle* (p. 4) openly acknowledged the conflict between these two decisions.

In view of the contingency that the Commission may seek certiorari in this Court in the *Universal-Rundle* case, United respectfully suggests that this Court may wish to withhold decision on this petition until the Commission has had time to file a petition in the *Universal-Rundle* case so that both petitions may be considered together.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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